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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961.

No. 180.

GUSTAVE B. GARFIELD, *Petitioner,*

v.

EDMUND PALMIERI, ***Respondent.***

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

GUSTAVE B. GARFIELD,
Attorney for Petitioner, pro se,
122 East 42nd Street,
New York 17, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-6978—1961

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1. In his opposing memorandum, the Solicitor General makes the specious contention that

> "In demanding the excision of the statements to which he objects, petitioner devotes most of his petition to an attack upon the correctness of Judge Palmieri's refusal to disqualify himself from the *Fleischer* case. *Even if there were some merit to these contentions, the appropriate forum in which to maintain them would clearly not be a private action against the judge, but on appellate review in the Fleischer litigation*" (pp. 3-4, Resp. memo. Italics supplied).

The foregoing contention is specious because it chooses to ignore the well pleaded allegations of the complaint, that Judge Palmieri, after the rendition of his opinion in

which he refused to disqualify himself, and proceeded to dismiss the second cause of action for antitrust violations by defendants in said Fleischer litigation "on reasonable demand and request of the plaintiff in said action, Dave Fleischer, refused to direct the Clerk of the United States District Court for the Southern District of New York to enter judgment of dismissal of said second cause of action on the merits, thereby preventing an appeal to the United States Court of Appeals for the Second Circuit and if necessary to the Supreme Court of the United States, by writ of certiorari from the said final judgment of dismissal at which time the plaintiff in said action could have brought on for hearing the denial of the motion for disqualification of the defendant herein for bias and prejudice aforesaid" (Appendix to Appellant's Brief below, p. 10a; complaint, par. 9).

Furthermore it is alleged in paragraph 11 (p. 11a, Appendix) of the complaint, which is admitted by failure to deny the same and is factually correct,

> "11. *That plaintiff in this action, not being a party to the action of Dave Fleischer v. A.A.P. Inc., has no standing in said action to appeal or otherwise move with respect to the opinion and order of this defendant containing the foregoing libelous words concerning the plaintiff;* that plaintiff in this action has never been charged with any offense or violation of the Canons of Ethics by the United States Court of Appeals, Second Circuit; that he has never been presented with any charges against him by said court; that he has never had an opportunity to meet any charges if made; that no order, edict or judgment of said court has ever been made; that the continued use of the opinion of this defendant Edmond Palmieri, and its presence on the records of the United States District Court for the Southern District of New York is a violation of the plaintiff's civil rights under the Fifth Amendment of the Constitution of the United States, under the common

> law and *the plaintiff has no adequate remedy at law to redress the wrongs committed against him by this defendant in libelling the plaintiff under color of office and in impairing his right to practice law without further libel by the parties to the litigation in the case of Fleischer v. A.A.P. Inc., who repeat the words of the defendant in this action quoted in the excerpts from his opinion.*"

Even an attempt by mandamus directed to Judge Palmieri at the United States Court of Appeals, Second Circuit, to compel him to direct the Clerk of the District Court to enter final judgment, was opposed by the law firm of Phillips, Nizer, Benjamin & Krim, the attorneys for the defendants in the Fleischer litigation, who appeared in said proceeding on behalf of Judge Palmieri.

To say therefore that plaintiff in this litigation, who has no standing as a party in the Fleischer litigation, is required to use that forum as a means of vindicating the violation of his civil rights by defendant, Judge Palmieri, is to disregard and ignore the futile attempts made by plaintiff to obtain a review in the *Fleischer* litigation, all of which were thwarted by the defendant.

2. As this is not an action seeking money damages but one seeking a declaratory judgment and to expunge from the record a libelous statement of and concerning the plaintiff as violative of his Constitutional rights, made without jurisdiction by the defendant of either the person of the plaintiff or of any proceeding seeking to discipline him, the cases cited by respondent, dealing with actions in which monetary damages alone are sought are hardly in point.

All of the cases cited by the Solicitor General sought money damages from either a judicial officer or other official. In each the *ratio decidendi* was whether the court or the official sued was acting in an official capacity or had jurisdiction.

In *Ex Parte Bradley*, 7 Wall 354 (not cited by respondent), this court struck from the record a decree disbaring the lawyer Bradley who was not cited, or given an opportunity to be heard by Judge Fisher. Plaintiff in this action seeks no greater relief than that which was afforded to attorney Bradley by this court.

The Solicitor General ignores entirely *Ex Parte Bradley*, but cites only *Bradley v. Fisher*, 13 Wall 335, in which Bradley sought monetary damages from Judge Fisher after he had been reinstated to practice. The distinction drawn by this court in *Bradley v. Fisher* at page 351 is well to be remembered, for it is the basic to the determination of this petition. It is as follows:

> "A distinction must be here observed between excess of jurisdiction and clear absence of jurisdiction over the subject matter. *Where there is clearly no jurisdiction over the subject matter any authority exercised is usurped authority and for the exercise of such authority when want of jurisdiction, is known to the judge, no excuse is permissible.*" (Italics supplied.)

There is not a pretense that the plaintiff in this action did or said anything in the presence of Judge Palmieri, so as to call for the invocation of the summary power of the Judge to punish for contempt committed in his presence.

Nor has Judge Palmieri, any jurisdiction to hear or determine disciplinary proceedings under Rule 5 of the General Rules of thern and Eastern Districts of New York, such dut ing to the lot of the Chief Judge of each District ' otation from the Rules at p. 25-a, Appendix).

It was for that reason that the plaintiff was at such pains in his complaint and in his opposing affidavits to

show that Judge Palmieri was ousted of jurisdiction by the filing of an affidavit of bias and prejudice, clearly sufficient, which he should have accepted as true, but did not.

Instead he permitted, counsel for the defendants in the *Fleischer* litigation to try the good faith of the application for disqualification and to insert in the record further scandalous allegations of fact, extraneous to the matter before the court. (See affidavit of Shainswitt, Appendix p. 55-a). Even the slanderous and subsequent libelous statements complained of had no relevance to the matter before the court for decision (see letter of Wasserstrom April 15, 1959, Appendix p. 60-a).

The distinction between excess of jurisdiction and no jurisdiction whatsoever is outlined in all of the cases cited by the Solicitor General from first to last.

Thus in *Randall v. Brigham*, 7 Wall 323 (1868), Randall sued a judge of Massachusetts, for money damages. This court held:

> "They (judges) are not liable to civil actions for their judicial acts, even when such acts are in excess of jurisdiction, *unless perhaps where the acts, in excess of jurisdiction are done maliciously or corruptly.* * * * But responsible they are not to private parties in civil action for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, *unless where the acts are palpably in excess of jurisdiction of the judges, and are done maliciously or corruptly.*" (Italics supplied.)

There is not even a pro forma denial of malice by Judge Palmieri.

That Judge Palmieri "had no lawful right or power to preside as judge" after the filing of a valid affidavit of bias and prejudice was settled by the decision of this

court in *Berger v. United States*, 255 U. S. 22 For such want of jurisdiction, he is at least answerable to the extent that it is sought by this action to have a declaration of his lack of jurisdiction in the premises and to have him expunge from the record, the libelous statement which he made of and concerning the plaintiff.

In *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2), cited by the Solicitor General (an action to recover money damages), Judge L. Hand said in pertinent part:

> "The decisions have indeed imposed as a limitation upon the immunity that the official's acts must have been within the scope of his powers. * * *"

In *Barr v. Matteo*, 360 U. S. 564 and *Howard v. Lyons*, 360 U. S. 593, this court exculpated the federal employees involved from liability for monetary damages, because it found as a fact that they were acting within the scope of their duties.

In *Brictson v. Woodrough*, 164 F. 2d 107 (C. A. 8), cited by the Solicitor General, it was found by Phillips, C. J., and not seriously disputed that:

> "All of the acts charged against such defendants consisted of judicial acts done by them as judges, each acting within the limits of his jurisdiction" (p. 109).

In *Meredith v. Van Osterhout*, 286 F. 2d 216 (C. A. 8), cert. den. 365 U. S. 835, cited by the Solicitor General, it was conceded in the pleadings that the defendant Judge, was "acting in his official capacity" but it was contended that his "adjudications were in bad faith." He was held not liable for money damages since he was *acting in his official capacity.*

3. *Lastly* it is asserted that the action must fall because "petitioner seeks to require a district judge, in his private

capacity, to take action which would affect records in the official custody of the judicial branch of the government"" (Resp. Brief, p. 4).

The answer to this argument is that plaintiff seeks a declaratory judgment that such portion of the defendant's opinion as is complained of "was rendered without jurisdiction, that it was and is oppressive, false, malicious and libelous and that its utterance and the continuance thereof as an opinion of the United States District Court for the Southern District of New York constitutes a violation of the plaintiff's rights under the Fifth Amendment to the United States Constitution, not to be deprived of life liberty and property without due process of law" (Appendix, p. 12a). Such portion of the prayer for relief does not even require the striking of the record within the custody of the judicial branch of the government. Furthermore, if the libelous matter is of record, it may be part of the judgment to direct the defendant to strike the oppressive opinion, or such part of it as libels the plaintiff, without doing violence to the sanctity of the judicial records of United States District Court for the Southern District of New York. There is no sanctity in libels, even when uttered by officials of great power, whoever they may be, nor how high their office.

Respectfully submitted,

GUSTAVE B. GARFIELD,
Plaintiff *pro se*.

August , 1961.